No. 13046

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CARL GETLIN, Administrator of the Estate of CORINNE CONSTANCE GETLIN, Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

ANDERSON & FRANKLIN, and
W. A. FRANKLIN,
317 S. W. Alder Street
Portland, Oregon
Attorneys for Appellant.

CAKE, JAUREGUY & TOOZE, and
HERBERT C. HARDY,
1220 Equitable Building,
Portland, Oregon
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 11-51

INDEX

TABLE OF AUTHORITIES CITED

No. 13046

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CARL GETLIN, Administrator of the Estate of CORINNE CONSTANCE GETLIN, Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

I.

APPELLANT'S REPLY TO APPELLEE'S FIRST ARGUMENT

We have no quarrel with appellee's statement of the doctrine of res judicata. Nor do we disagree with appellee's contention that the matter is to be determined

under the second phase of the doctrine. It is the contention of the appellant that there was no issue in the state court as to whether or not decedent was "engaged in the employment of the assured," at the time of the accident. Neither was this question adjudicated or necessarily involved.

Appellee complains that we have failed to include some of the allegations of the complaint in our opening brief. Appellee then sets forth an example of an employer taking an employee on a Sunday fishing trip and points out, quite correctly, that under such circumstances the employee is a guest. Obviously, under such circumstances, *the injury did not arise out of the employment.*

A much better example would be as follows:

A employs B to work at a plant which is five miles from B's home. A furnishes B transportation from home to plant, and from the plant back to his home. However, B is paid only for the time he is working at the plant. B is injured while being transported to the plant in A's vehicle. Under such circumstances (1) B is not a guest within the meaning of the guest statute; (2) the injury arises "out of the employment;" (3) B is not "engaged in the employment." We think the foregoing illustration is more analogous to the situation presented here than the appellee's fishing trip example.

Appellee argues that in the state court appellant alleged specifically and with care that the transportation was pursuant to decedent's contract of employment with the assured. There is no question about this. It was specifically alleged in this manner to come within the rule of *Lamm v. Silver Falls Timber Co.,* 133 Or. 468.

In that case the defendant in its answer specifically alleged *"that prior to November 9, 1926, plaintiff and defendant entered into a contract of employment and, a part thereof, plaintiff entered upon the premises of the defendant at Silverton, Oregon, and rode upon its logging train up to the woods where he was to work; that, on November 6, 1926, and while in the defendant's employ, plaintiff rode to Silverton on the logging train under his contract of employment. * * *"* (p. 474.) (Italics ours.)

Thus it becomes perfectly obvious that under the decision of the Lamm case, and the companion case of *Varrelman v. Flora Logging Co.,* 133 Or. 541, the transportation in each instance was "pursuant to the contract of employment," and yet the Court carefully pointed out that under such circumstances the injury "arose out of the employment," although the injured employee was not "engaged in the employment."

The appellee at page 8 of its brief refers to certain "alleged" contentions of the appellee in the District Court. It is significant that the appellee does not deny that these contentions were made in the District Court. Apparently the appellee has now abandoned this former line of argument and now chooses to blithely ignore the Court's specific instructions to the jury in the state court case that before the plaintiff could recover it must be shown (1) that both deceased and Rodgers were employees, (2) that Rodgers was driving by authority of and at the express direction of Kalahar, and (3) that decedent *"was not permitted to participate in or direct the operation of or exercise control over the operation of the car in which she at the time was riding."*

It appears quite clear that the specific issue here was not in issue, directly adjudicated or necessarily involved in a determination of the state court action.

II.

APPELLANT'S REPLY TO APPELLEE'S SECOND ARGUMENT

We believe it to be quite clear that under the authorities that the appellant has cited in his opening brief, the decedent was not "engaged in the employment" within the meaning of the policy at the time of the fatal accident.

Appellee in its brief has not denied that decedent was paid only on a commission basis for the subscriptions sold during the time she was actually soliciting. Neither has appellee alleged that decedent was doing anything more than passively riding in the vehicle at the time of the fatal accident.

Appellant would like to point out to the Court that most of the cases cited in appellee's brief are not in point, or that they are distinguishable.

Appellee contends that we cannot rely upon *Lamm v. Silver Falls Timber Co.,* 133 Or. 468, for the reason that it involved workmen's compensation. On page 13 of its brief appellee quotes extensively from Labatt's Master and Servant, as follows:

> "A servant who, at the time of the accident in suit was being transported on a railway car or other vehicle furnished for the purpose of facilitating the

performance of his work, is deemed to have been *injured in the course of his employment, and therefore can not recover if the injury was the result of risk known to and appreciated by him.* * * *" (Italics ours.)

Thus it is apparent that the rule at common law was the same as we have heretofore pointed out in appellant's opening brief. If the employee was injured while being transported in the employer's vehicle in order to facilitate the performance of his work the injury "arose out of and within the course of the employment," but if the right of the master to exact the performance of services was dormant then it could not be said that the employee was injured while "engaged in the employment."

Actually all that Mr. Labatt was dealing with was the common law defense of "assumption of risk." However it does indicate that the rule at common law was precisely the same as that announced by the court in *Lamm v. Silver Falls Timber Co.,* supra.

At page 14 of its brief the appellee contends that it is obvious from the nature of the employment that it was essential to the employer that his employees travel in the vehicle provided. While it was undoubtedly preferable it certainly was not essential. All that was essential was that the salesmen be at the particular town when required. As a matter of fact the majority of them made use of the vehicle provided by Kalahar. However, this was not an infallible rule.

We have discussed the case of *Webb v. The American Fire & Casualty Company* (Fla., 1941), 5 So. 2d 252, in appellant's opening brief. Appellee relies upon this case

but apparently does not refute our contention that the case is expressly predicated upon two cases which are not in point. An examination of this case and the two cases cited therein will substantiate our position.

Likewise an examination of the case of *Gilmore v. The Royal Indemnity Company, et al.,* Ohio Court of Appeals, 24 Automobile Cases 1091, indicates the Ohio court makes no distinction between the phrases "arising out of the employment" and "engaged in the employment." That may be the rule in Ohio but certainly not in Oregon. Actually all the Ohio court did decide was that the injury "arose out of the employment."

Let us now turn to appellee's contentions with regard to *State Farm Mutual Automobile Insurance Company v. Brooks,* 136 F. 2d 807 (Ap. Br. p. 19, 20). In an attempt to place the case on all fours with this case appellee, as its second contention, asserts, "We agree that the daily wage in the Brooks case *probably* took into account the time of transportation, but it is just as surely true that the rate of commission in this case *must have taken into account the travel time necessary between cities and states.*" This contention appellee knows to be incorrect. Decedent was paid strictly on a commission basis and if she sold nothing she was paid nothing.

Appellee cites the case of *Westcott v. U. S. Fidelity & Guaranty Co.,* 158 F. 2d 20 (Ap. Br. 24). In that case the facts are substantially as set out in appellee's brief. However, in addition to an exclusion substantially the same as the one in question here, the insurance policy provided it did not apply "to any employee with respect to

injury to or death of another employee of the same employer in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of the employer." It appears from the facts that the insured was one Geo. T. Westcott, and that one Geo. L. Mann, as insured's agent, was driving the deceased to the insured's casino at the time of the accident. The Court stated the rule to be:

> "When an employer by express contract furnishes to an employee transportation to and from the place of employment, the employee who was injured while being so transported *is injured or killed in the course of the employment.*" (Italics ours.)

It is apparent from reading the case that it was decided because of the exception hereinbefore quoted and not because of an exception similar to the one at issue here. The case is no authority at all for the proposition for which it was cited in appellee's brief.

Appellee relies upon *Johnson v. Aetna Casualty & Surety Co.,* 104 F. 2d 22 (Ap. Br. 25). In this case the Federal District Judge held that at the time of the collision plaintiffs were employees of the insured and "in the course of their employment," and that the policy did not cover the liability. In affirming the District Judge the Circuit Court of Appeals stated the general rule to be,

> "It has often been held that the employees riding free to and from their work in the employer's vehicle continue to be employees and are not passengers."

The opinion then points out that the plaintiff, being an employee, could not recover under the policy, since the policy carried an exception relieving the insurance

but apparently does not refute our contention that the case is expressly predicated upon two cases which are not in point. An examination of this case and the two cases cited therein will substantiate our position.

Likewise an examination of the case of *Gilmore v. The Royal Indemnity Company, et al.,* Ohio Court of Appeals, 24 Automobile Cases 1091, indicates the Ohio court makes no distinction between the phrases "arising out of the employment" and "engaged in the employment." That may be the rule in Ohio but certainly not in Oregon. Actually all the Ohio court did decide was that the injury "arose out of the employment."

Let us now turn to appellee's contentions with regard to *State Farm Mutual Automobile Insurance Company v. Brooks,* 136 F. 2d 807 (Ap. Br. p. 19, 20). In an attempt to place the case on all fours with this case appellee, as its second contention, asserts, "We agree that the daily wage in the Brooks case *probably* took into account the time of transportation, but it is just as surely true that the rate of commission in this case *must have taken into account the travel time necessary between cities and states.*" This contention appellee knows to be incorrect. Decedent was paid strictly on a commission basis and if she sold nothing she was paid nothing.

Appellee cites the case of *Westcott v. U. S. Fidelity & Guaranty Co.,* 158 F. 2d 20 (Ap. Br. 24). In that case the facts are substantially as set out in appellee's brief. However, in addition to an exclusion substantially the same as the one in question here, the insurance policy provided it did not apply "to any employee with respect to

injury to or death of another employee of the same employer in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of the employer." It appears from the facts that the insured was one Geo. T. Westcott, and that one Geo. L. Mann, as insured's agent, was driving the deceased to the insured's casino at the time of the accident. The Court stated the rule to be:

> "When an employer by express contract furnishes to an employee transportation to and from the place of employment, the employee who was injured while being so transported *is injured or killed in the course of the employment.*" (Italics ours.)

It is apparent from reading the case that it was decided because of the exception hereinbefore quoted and not because of an exception similar to the one at issue here. The case is no authority at all for the proposition for which it was cited in appellee's brief.

Appellee relies upon *Johnson v. Aetna Casualty & Surety Co.,* 104 F. 2d 22 (Ap. Br. 25). In this case the Federal District Judge held that at the time of the collision plaintiffs were employees of the insured and "in the course of their employment," and that the policy did not cover the liability. In affirming the District Judge the Circuit Court of Appeals stated the general rule to be,

> "It has often been held that the employees riding free to and from their work in the employer's vehicle continue to be employees and are not passengers."

The opinion then points out that the plaintiff, being an employee, could not recover under the policy, since the policy carried an exception relieving the insurance

company from liability if the insured might be held liable under a *workmen's compensation law*. Since the employee was injured within the course of his employment, the employee could make a claim under the compensation act. The case does not even discuss, and is no authority that a workman being furnished gratuitous transportation is "engaged in the employment."

The only case cited by appellee which would appear at all to support its position is the case of *Lumber Mutual Casualty Co. v. Stukes,* 164 F. 2d 571 (Ap. Br. 26). In that case the main contention of the plaintiff was that decedent was not an employee at the time of the fatal accident, but was a fare-paying passenger, as he was charged three per cent of his wages for transportation. However, the Court found that the three per cent was in reality deducted to pay unemployment insurance which the South Carolina statutes did not allow the employer to deduct. Since this was a mere subterfuge, the Court found that it did not affect the employer-employee relationship. The Court then goes on to say:

> "There can be no question that under the law of South Carolina, decedent enjoyed the status of an employee engaged in employment at the time of the accident which resulted in his death."

We believe that this decision is inherently wrong, and is opposed to all of the well-reasoned cases on the matter, and even if it be the settled law of the State of South Carolina, it is certainly not the law of the State of Oregon.

Appellee has discussed the case of *Francis v. Scheper,* 326 Mich. 447, at pages 27, 28 and 29 of its brief. Appellee purports to find a good deal of difference between this

case and the case at issue here. We feel that it would be difficult to find a case more on all fours. As pointed out at the bottom of page 28 of appellee's brief, the plaintiff Francis did not claim in the principal case that the relation of employer and employee had anything to do with the liability of assured, other than the furnishing of the ride was part of plaintiff's compensation for his work. Francis in the main case did not claim he was engaged in assured's employment at the time of the accident. That is the identical situation here.

Appellee argues that public liability policies, such as the one involved herein, have a definite and useful place in our automobile age. We have no quarrel with appellee's contention in this regard. However, the insurance policy is nothing more nor less than a contract that appellee voluntarily entered into. Appellee has received the premium on this policy, but now seeks to avoid its obligations under the policy. If insurance carriers desire to avoid the obligations of public liability policies which they have issued, they should advance a more plausible reason than their well known reluctance to pay.

In this particular case the appellee, at the time it issued the policy, knew that it was to cover a Chevrolet station wagon. Appellee knew the business of the assured, and listed his occupation as a "salesman" (Tr. p. 28),. Appellee knew that the assured was engaged in hauling carloads of young people about the country in the furtherance of his business of a "salesman." The policy was issued specifically to Kalahar to cover his liability in the event someone was accidently injured in the operation of the insured vehicle.

We submit that the exception in the policy does not apply to the factual situation in this instance, and that the judgment of the District Court should be reversed.

Respectfully submitted,

ANDERSON & FRANKLIN,

By W. A. FRANKLIN,

Attorneys for Appellant.